TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 183.

O. G. HOLT, TRUSTEE IN BANKRUPTCY OF DAVIS, KELLY & COMPANY, BANKRUPTS, APPELLANT,

vs.

CRUCIBLE STEEL COMPANY OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JANUARY 6, 1912.

(21,955.)

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1 United States Circuit Court of Appeals for the Sixth Circuit.

#1940.

CRUCIBLE STEEL COMPANY OF AMERICA, Appellant,
vs.
O. G. HOLT, Trustee in Bankruptcy of Davis, Kelly & Co., Bankrupts, Appellees.

On the 16th day of November, 1909, an opinion was filed in the above entitled cause which reads and is as follows:

Opinion.

2 Filed Nov. 16, 1909. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 1940.

CRUCIBLE STEEL COMPANY OF AMERICA, Appellant,
v.
O. G. HOLT, Trustee in Bankruptcy of Davis, Kelly & Co., Bankrupts, Appellee.

Appeal from the District Court of the United States for the Western District of Kentucky.

Submitted October 13, 1909. Decided November 2, 1909.

Before Lurton, Severens and Warrington, Circuit Judges.

SEVERENS, Circuit Judge, delivered the opinion of the court.

The controversy between these parties involves the question of the right of the vendor of goods sold by the vendor, the Crucible Steel Co., by a conditional sale to the bankrupt under an agreement that the title was to remain in the vendor until payment of the purchase price. By the law of Kentucky, where the transaction occurred, such a sale amounts to a sale and a chattel mortgage back to the vendor, and is subject to the provisions of the statute of the state concerning the recording of chattel mortgages. The statute reads as follows:

"No deed, or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against
3 a purchaser for a valuable consideration without notice thereof, or against creditors until such deeds shall be acknowledged or proved according to law and lodged for record."

This contract for a conditional sale was not recorded. Certain parties became creditors of the bankrupt after the date of the con-

tract, but before the filing of the petition in bankruptcy; and it is these parties in whose behalf the trustee makes this contest against the claim of the vendors in the contract of sale of the title and for the possession of the goods. The District Court rejected the claim of the vendor, and denied its petition.

In the case of York Mfg. Co. v. Cassell, 201 U. S. 344, the Supreme Court, reversing a judgment of this court, held that the trustee in bankruptcy takes the assets in precisely the same condition and with the like title as that by which they were held by the bankrupt, and, further, that the inchoate equity of creditors who had not then secured a lien by some judicial proceeding could not be worked out in their behalf by the trustee in the bankruptcy proceedings. That decision necessarily negatives the application to such a case of the provision of Sect. 67*a*, that "claims which for want of record or for other reasons, could not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate;" and the further provision of Sect. 67*b*., that "whenever a creditor is prevented from inforcing his rights as against a lien created or attempted to be created by his debtor who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate." Those provisions were not referred to in the opinion of the court and of course their meaning and scope were not defined further than is done by the necessary implication from the decision, but it cannot be supposed they were overlooked. We note that in Thomas v. Taggart, 209 U. S. 385, at p. 389, Mr. Justice Day said: "The rule is generally recognized that if the title to property claimed is good as against the bankrupt and his creditors at the time the trustee's title accrued, the title does not pass
4 and the property should be restored to its true owner." But when he says, "and his creditors" we must suppose he means creditors who have secured a lien, for he cites York Mfg. Co. v. Cassell.

Accepting then the decision in the case of York Mfg. Co. v. Cassell as authoritative, what were the respective rights of the Crucible Steel Co. and the bankrupt in the goods in question at the date of the filing of the petition? As between them the mortgage was valid, though not recorded. No creditor had fastened any lien upon them although several of them were in a condition and had a right to do so. These two facts were regarded as decisive by the Supreme Court in the case referred to and they seem equally decisive here. In the case entitled In Re Doran, 154 Fed. 467, we discussed at some length the meaning and effect of the Kentucky Statute relating to the recording of chattel mortgages, and as to whether general creditors are protected thereby, but we felt constrained to abide by the opinion of the Supreme Court in York Mfg. Co. v. Cassell as settling the grounds upon which cases of this sort must be determined. In the Doran case the chattel mortgage had been filed before the filing of the petition. In the present case it had not. But we cannot perceive that the difference is important. The mortgage was valid as between the mortgagor and the mortgagee whether

recorded or not, and there is no express definition by the statute which extends the meaning of the word "creditors" so as to include general creditors having no lien.

Since the decision in the Doran case, in which we noticed the apparently conflicting cases in the Kentucky reports concerning the effect of the statute above quoted, counsel have discovered a case marked "not to be reported" in 99 S. W. Rep. 631, Berten & Langen v. People's Mess. &c. Co., and they refer to a recent case, Swafford's Admr. v. Asher, and claim from them it is shown that the Court of Appeals has finally settled the law to be that general creditors who have become such while the mortgage remained unfiled are to be protected. The court below seems to have so held, and some of the language of the judges who delivered opinions in those cases seem to favor that construction. But there was no determination by the court which disposes of the uncertainty we encountered in the Doran case, but upon which we gathered the impression that the trend of the state decisions was against the contention of the trustee.

The decree of the court below must be reversed with direction to order the trustee to surrender the property in question to the petitioner.

And afterwards to wit on December 16th, 1909, there was entered upon the Journal of said Court in said cause a finding of facts and conclusions of law thereon in the following words, to wit:

United States Circuit Court of Appeals for the Sixth Circuit.

#1940.

CRUCIBLE STEEL COMPANY OF AMERICA, Appellant,
vs.
O. G. HOLT, Trustee in Bankruptcy of Davis, Kelly & Co., Bankrupts, Appellees.

Finding of Facts and Conclusions of Law Thereon.

Pursuant to the provisions of Sub-section 3 of Section XXXVI, of General Orders in Bankruptcy, the Court does now make and file a finding of the facts herein and its conclusions of law thereon; the same being stated separately as follows:

Finding of Facts.

On January 7th, 1908, the Crucible Steel Company of America sold and delivered unto Davis, Kelly & Co., at Louisville, Kentucky, a quantity of steel; this sale is evidenced by a writing of that date signed by the vendor and accepted in writing by vendee. This writing contains a provision reserving title to said steel in the Cruci-

ble Steel Company until the payment of the entire purchase price; said reservation of title being in these words:

"title to all goods, however, to remain in our name until such time "as the money is received by us."

This writing was never recorded in the Office of the Clerk of the County Court of Jefferson County, Kentucky.

7 Davis, Kelly & Co., were subsequently adjudged bankrupts in the District Court of the United States for the Western District of Kentucky, and in the proceedings in bankruptcy then ensuing, said Crucible Steel Company filed its claim.

In its proof of claim, said Crucible Steel Company set out (in par. 2) the indebtedness owing to it from said bankrupts on account of the unpaid portion of the purchase price of said steel, amounting to $14,882.61 and interest, and asserted a lien under the provisions of aforesaid writing upon the steel sold thereunder "as security for the payment of the purchase price thereof."

The appellee, O. G. Holt, Trustee in Bankruptcy of Davis, Kelly & Co., opposed the allowance of said claim as a "secured claim" and objected thereto on behalf of those creditors of said bankrupts whose claims arose and were credited after the execution of said writing and after the delivery unto Davis, Kelly & Co., of the steel sold thereunder, and which creditors had neither actual nor constructive notice of the lien of the Crucible Steel Company.

The Crucible Steel Company admits in its proof of claim that said writing was in legal effect, under the law of the State of Kentucky, "a sale by the Crucible Steel Company of America to Davis, Kelly & Co., and a mortgage back from Davis, Kelly & Co., to the Crucible Steel Company of the steel sold under said contract as a security for the payment of the purchase price thereof."

The only question presented, therefore, arose under the objection made by the Trustee in behalf of these subsequent creditors without notice, to the allowance of said claim as a secured claim;

8 said Trustee claiming that as to such subsequent general creditors without notice said lien of the Crucible Steel Company was invalid because of the failure of said Crucible Steel Company to lodge said mortgage or writing creating its lien in the office of the Clerk of the County Court of Jefferson County, Kentucky, for record, as provided for in Section 496 of the Kentucky Statutes of 1903.

The determination of this question involves a consideration of the provisions of the National Bankruptcy Act, and an ascertainment of the right thereunder of such subsequent creditors without notice, who have no lien upon the mortgaged property, to contest the validity of a prior unrecorded mortgage.

We agree that the above finding of facts is correct.

H. H. NETTELROTH,
Att'y for Appellee.
BULLITT & BULLITT,
Att'ys for Appellant.

The foregoing finding of facts argued to by the attorneys for the parties having been examined by the Court are found to be correct.

Conclusions of Law.

This Court is of the opinion and holds:

1st. That the creditors for whom the trustee makes this contest were, at the time when the adjudication of bankruptcy was made, entitled to take legal proceedings for the establishment of a lien on the goods in question for the payment of the debts owing to them, and for the enforcement of such a lien.

9 2nd. That not having taken any proceeding for such a purpose they had not at the time above mentioned acquired a lien upon the goods.

3rd. That the goods went into the possession of the trustee free from any lien of these creditors.

4th. That Section 496 of the Statutes of Kentucky of 1903 in providing for the recording of "conveyances" includes conditional sales under that designation.

5th. That the statute mentioned in speaking of "creditors," as to whom unrecorded mortgages are declared void, must be understood to mean creditors who have acquired a lien by some such proceeding as above mentioned.

6th. That as between the Crucible Steel Company and the bankrupt the reservation of the title by the former was valid, and it was immaterial that the contract of sale was not recorded.

7th. That the Bankrupt Act does not devolve upon the Trustee the power to establish and enforce in the bankruptcy proceedings a lien upon the goods in behalf of the creditors in whose behalf he opposes the claim of the petitioner.

8th. That the conclusion from the premises must be that the petitioner, the Crucible Steel Company, is entitled to prove its claim as one entitled to priority in the proceeds of the disposition thereof, to the extent of the unpaid purchase price of the goods due to the petitioner, and if there should still remain a deficit, it is entitled, to the extent thereof, to rank with the general creditors.

In support of these conclusions reference is made to the opinion of this Court heretofore filed in this case.

10 And on the same day, to wit on December 16th, 1909, a decree was entered in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#1940.

CRUCIBLE STEEL COMPANY OF AMERICA, Appellant,
vs.
O. G. HOLT, Trustee in Bankruptcy of Davis, Kelly & Co., Bankrupts. Appellees.

Decree.

This cause came on to be heard upon a petition for rehearing; on consideration whereof it is now here ordered by this Court that the decree heretofore entered in this cause, be and the same is hereby set aside and held for naught, and it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court for the Western District of Kentucky in this cause be, and the same is hereby reversed with costs, and the cause is remanded to the said District Court with directions to enter an order allowing the claim of the petitioner as a lien upon the goods in question for the unpaid purchase money, to the extent of the amount realized upon the sale thereof paramount to the claims of the general creditors, and to make distribution of the proceeds accordingly.

11 And afterwards to wit on December 17th, 1909, a petition for appeal and assignments of error were filed which read and are as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#1940.

CRUCIBLE STEEL COMPANY OF AMERICA, Appellant,
vs.
O. G. HOLT, Trustee in Bankruptcy of Davis, Kelly & Co., Bankrupts, Appellee.

Petition for Appeal.

The above named appellee, O. G. Holt, Trustee in Bankruptcy of Davis, Kelly & Co., Bankrupts, respectfully shows that the above entitled cause is a proceeding in bankruptcy, and involves the construction and interpretation of the existing Bankruptcy Acts of the United States and especially of Subsections or paragraphs *'a'* and *'b'* of Section 67 of the Act of the United States entitled, "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," approved July 1st, 1898; that said cause is now pending in the United States Circuit Court of Appeals for the Sixth Circuit, which said Court had jurisdiction herein as a Court of Bankruptcy; that a final judgment and decree has been rendered

in said cause by said Court on the 16th day of December, 1909, reversing the judgment and decree therein rendered by the District Court of the United States for the Western District of Kentucky; that the matter in controversy in said cause exceeds the sum of Two Thousand ($2,000.00) Dollars, exclusive of interest and
12 costs, and that this cause is not one of the causes in which the United States Circuit Court of Appeals for the Sixth Circuit has final jurisdiction; that this a proper cause to be reviewed by the Supreme Court of the United States on appeal, and that this petitioner is entitled to an appeal to the Supreme Court of the United States from aforesaid judgment and decree rendered herein by said United States Circuit Court of Appeals.

Wherefore, this petitioner, appellee in this Court, considering himself aggrieved by said judgment and decree rendered by this Court as aforesaid, doth hereby appeal from said judgment and decree to the Supreme Court of the United States, and he prays that said appeal may be allowed him herein, and that the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit be directed to send to the Supreme Court of the United States the record and proceedings in said cause with all things concerning the same, including the finding of facts and conclusions of law thereon, duly authenticated, in order that the errors complained of in the assignment of errors filed herewith by this petitioner may be reviewed, and if any error or errors be found, that the same may be corrected according to the laws and customs of the United States.

HERMAN H. NETTELROTH,
Attorney for Petitioner O. G. Holt, Trustee in Bankruptcy of Davis, Kelly & Co., Appellee in this Court.

The prayer of the foregoing petition is granted and an appeal allowed. No bond will be required of the Trustee.

Dated Dec. 17th, 1909.

H. F. SEVERENS,
Circuit Judge.

13 And afterwards on the same day, to wit December 17th, 1909, assignments of error were filed which read and are as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#1940.

CRUCIBLE STEEL COMPANY, Appellant,
vs.
O. G. HOLT, Trustee in Bankruptcy of Davis, Kelly & Co., Bankrupts, Appellee.

Assignment of Errors on Appeal.

The petitioner herein, O. G. Holt, Trustee in Bankruptcy of Davis, Kelley & Co., Bankrupts, appellee in this Court, now presents and files this, his assignment of errors, in connection with his petition for an appeal to the Supreme Court of the United States, and he says that in the record and proceedings herein there is manifest error, and that the United States Circuit Court of Appeals for the Sixth Circuit, in its decision of this cause and in the final judgment and decree rendered and entered herein on the 16th day of December, 1909, erred in the following respects, to wit:

In reversing the judgment and decree of the District Court of the United States for the Western District of Kentucky, which adjudged and decreed the mortgage or lien of said Crucible Steel Company upon certain property, embraced therein, to be invalid and unenforcible as to those creditors who had proved their claims against said bankrupts and whose claims, duly allowed in said bankruptcy proceeding, arose and were created after the execution
14 of said mortgage or instrument creating said alleged lien but without notice thereof; said alleged mortgage or instrument in writing, under which said lien asserted by said Crucible Steel Company was claimed, being unrecorded.

(*a*). This petitioner contends that the lien of said Crucible Steel Company under said instrument in writing or unrecorded mortgage was invalid and unenforcible as against such subsequent creditors of said bankrupts who extended credit to said bankrupts without notice of the existence of said mortgage or lien, and that therefore said mortgage or lien was, to that extent as held by said District Court, invalid and unenforcible against bankrupts' estate by virtue of Section 67*a*, of the Bankruptcy Act of the United States.

(*b*). This petitioner further contends that the said lien asserted by said Crucible Steel Company was also rendered invalid and unenforcible in said bankruptcy proceeding as against the claims therein allowed, of such 'subsequent creditors without notice,' by virtue of Section 67*b*, of said Bankrutcy Act.

Wherefore, said petitioner, O. G. Holt, Trustee in Bankruptcy of Davis, Kelley & Co., Bankrupts, appellee in this Court, appeals to the Supreme Court of the United States, against said Crucible Steel Company of America, and prays that the aforesaid judgment and decree of said United States Circuit Court of Appeals for the Sixth

Circuit may be reversed, and that the decision and the judgment and decree of the District Court of the United States for the Western District of Kentucky appealed from in this cause be affirmed.

HERMAN H. NETTELROTH,
Attorney for Petitioner O. G. Holt, Trustee in Bankruptcy of Davis, Kelly & Co., Bankrupts, Appellee in this Court.

15 And afterwards to wit on the 27th day of December, 1909, an opinion was filed in said cause which reads and is as follows:

Opinion.

16 Filed Dec. 27, 1909. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 1940.

CRUCIBLE STEEL COMPANY OF AMERICA, Appellant,
v.
O. G. HOLT, Trustee in Bankruptcy of Davis, Kelly & Co., Bankrupts, Appellee.

Appeal from the District Court of the United States for the Western District of Kentucky.

On Rehearing.

Since our opinion was announced and the judgment entered in this case, November 2, 1909, a petition for rehearing has been filed, from which, and a recurrence to the record, it appears that the petitioner did not ask in the court below for the surrender of the possession of the goods in question, but for the enforcement of a lien thereon and a privilege of priority over general creditors in the proceeds of a sale of the goods; in consideration whereof it is apparent that the judgment should not have been for the return of the possession, but should have been a declaration that the petitioner was entitled to prove its claim as a creditor, and was entitled to a lien upon the goods in question for the unpaid purchase money and to the extent of the amount realized, or to be realized, upon the sale thereof, the trustee should accord to the petitioner a lien thereon paramount to the claims of general creditors and make distribution of the proceeds accordingly.

The judgment so entered will therefore be reversed and held for naught; and a new judgment will be entered in the form and to the effect as above indicated to be correct, with costs to the
17 petitioner. The petition for rehearing will in other respects be overruled. But before the entry of the judgment above

directed, the court will, upon the request of the appellee now made, make and file a finding of the facts and conclusions of law as required by Order No. 36 of the General orders in Bankruptcy prescribed by the Supreme Court.

We think there was no error in entering the former judgment without a finding of facts and law, none having been requested. We agree with the Circuit Court of Appeals for the Seventh Circuit in holding, as it did in Knapp v. Milwaukee Trust Co., 162 Fed. 678, 679, that the 3rd paragraph of General Order 36 does not require such findings to be made without request, but is intended to give the party a right to such findings, to be conceded if he demands it, which we think he should do either before the opinion of the court given or, if thereafter, before the judgment is entered.

18 UNITED STATES OF AMERICA, *ss:*

To Crucible Steel Company of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit wherein O. G. Holt, Trustee in Bankruptcy of Davis, Kelly & Company, Bankrupt is Appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry F. Severens, United States Circuit Judge for the Sixth Circuit, this seventeenth day of December, in the year of our Lord one thousand nine hundred and nine.

HENRY F. SEVERENS,
United States Circuit Judge for the Sixth Circuit.

Dec. 24, 1909, citation and notice accepted.

BULLITT & BULLITT,
THOMAS W. BULLITT,
For Crucible Steel Co

19 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the finding of facts and conclusions of law thereon, petition for appeal, assignments of error and the opinion of the Court, and the original citation in the case of Crucible Steel Company of America vs. O. G. Holt, trustee in Bankruptcy of Davis, Kelly & Co., Bankrupts, No. 1940, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and

affixed the seal of said Court, at the City of Cincinnati, Ohio, this 27th day of December, A. D. 1909.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 21,955. U. S. Circuit Court of Appeals, 6th Circuit. Term No. 183. O. G. Holt, trustee in bankruptcy of Davis, Kelly & Company, bankrupts, appellant, vs. Crucible Steel Company of America. Filed January 8th, 1910. File No. 21,955.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 183.

Office Supreme Court, U. S.
FILED.
FEB 23 1912
JAMES H. McKENNEY
Clerk

O. G. Holt, Trustee in Bankruptcy of
Davis, Kelly & Company, Bankrupts, - *Appellant,*

vs.

Crucible Steel Company of America, - - - *Appellee.*

Brief for Appellant.

H. H. NETTELROTH,
Attorney for Appellant.

JOHN C. DOOLAN,
Of Counsel.

John P. Morton & Company, Incorporated, Louisville

Points and References.

QUESTION INVOLVED.

Contest in a proceeding in bankruptcy between the holder of an unrecorded chattel mortgage, on one side, and the trustee in bankruptcy, on behalf of certain subsequent creditors, on the other side.

STATUTE OF KENTUCKY INVOLVED.

Section 496, Kentucky Statutes, which provides:

> "No deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deeds shall be acknowledged or proved according to law, and lodged for record."

ABOVE STATUTE CONSTRUED.

Wicks Bros. vs. McConnell, 102 Ky., 434.

Besten & Langen vs. Peoples' Messenger & Parcel Delivery Co., 99 S. W., 631; 30 Ky. Law Rep. 787.

Swafford's Adm'r vs. Asher, 105 S. W., 164; 31 Ky. Law Rep. 1338.

In re Ducker, 134 Federal 43; 13 Am. Bankruptcy Rep. 760.

The foregoing cases are cited to show that under the law of Kentucky an unrecorded mortgage is invalid as to subsequent creditors without notice *even though such creditors have fastened no lien upon the mortgaged property.*

CASE EXPLAINED.

York Manufacturing Co. vs. Cassell, 201 U. S., 344.

This case involved a similar question under the laws of Ohio, but under the laws of *that* State *such creditors only who have obtained a lien may resist an unrecorded mortgage.*

PROVISIONS OF BANKRUPTCY ACT RELIED UPON.

Section 67 a and b; copied on last page of brief.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 183.

O. G. HOLT, TRUSTEE IN BANKRUPTCY OF DAVIS, KELLY & COMPANY, BANKRUPTS, - *Appellant,*

vs.

CRUCIBLE STEEL COMPANY OF AMERICA, - - *Appellee.*

Appeal from a decree of the United States Circuit Court of Appeals, for the Sixth Circuit, in a proceeding in Bankruptcy.

BRIEF FOR APPELLANT.

The appeal herein brings before this court for review a decree by the United States Circuit Court of Appeals, for the Sixth Circuit, in a proceeding in bankruptcy.

The errors complained of by appellant are that the court did not give proper effect to the provisions of the Bankruptcy Act, in that it refused to recognize the rights of certain creditors under the Recording Acts of the State of Kentucky, as against the lien claimed by the holder of an unrecorded mortgage, and which rights are secured to such creditors by Sections 67a and 67b of the Bankruptcy Act.

FINDING OF FACTS.

The finding of facts contained in the record, pages 3 and 4, was endorsed as correct by counsel for both appellant and appellee, and as it states the facts in concise manner we will copy that finding:

"On January 7th, 1908, the Crucible Steel Company of America sold and delivered unto Davis, Kelly & Co., at Louisville, Kentucky, a quantity of steel; this sale is evidenced by a writing of that date signed by the vendor and accepted in writing by vendee. This writing contains a provision reserving title to said steel in the Crucible Steel Company until the payment of the entire purchase price; said reservation of title being in these words:
'title to all goods, however, to remain in our name until such time as the money is received by us.'
This writing was never recorded in the Office of the Clerk of the County Court of Jefferson County, Kentucky.

7 Davis, Kelly & Co., were subsequently adjudged bankrupts in the District Court of the United States for the Western District of Kentucky, and in the proceedings in bankruptcy then ensuing, said Crucible Steel Company filed its claim.

"In its proof of claim, said Crucible Steel Company set out (in par. 2) the indebtedness owing to it from said bankrupts on account of the unpaid portion of the purchase price of said steel, amounting to $14,882.61 and interest, and asserted a lien under the provisions of aforesaid writing upon the steel sold thereunder 'as security for the payment of the purchase price thereof.'

"The appellee, O. G. Holt, Trustee in Bankruptcy of Davis, Kelly & Co., opposed the allowance of said claim as a 'secured claim' and objected thereto on behalf of those creditors of said bankrupts whose claims arose and were credited after the execution of said writing and after the delivery unto Davis, Kelly & Co., of the steel sold thereunder, and which

creditors had neither actual nor constructive notice of the lien of the Crucible Steel Company.

"The Crucible Steel Company admits in its proof of claim that said writing was in legal effect, under the law of the State of Kentucky, 'a sale by the Crucible Steel Company of America to Davis, Kelly & Co., and a mortgage back from Davis, Kelly & Co., to the Crucible Steel Company of the steel sold under said contract as a security for the payment of the purchase price thereof.'

"The only question presented, therefore, arose under the objection made by the Trustee in behalf of these subsequent creditors without notice, to
8 the allowance of said claim as a secured claim; said Trustee claiming that as to such subsequent general creditors without notice said lien of the Crucible Steel Company was invalid because of the failure of said Crucible Steel Company to lodge said mortgage or writing creating its lien in the office of the Clerk of the County Court of Jefferson County, Kentucky, for record, as provided for in Section 496 of the Kentucky Statutes of 1903.

"The determination of this question involves a consideration of the provisions of the National Bankruptcy Act, and an ascertainment of the right thereunder of such subsequent creditors without notice, who have no lien upon the mortgage property, to contest the validity of a prior unrecorded mortgage."

From the above finding, we see that "the Crucible Steel Company admits in its proof of claim that the writing was in legal effect, under the law of Kentucky, *a sale by the Crucible Steel Company of America to Davis, Kelly & Co., and a mortgage back from Davis, Kelly & Co., to the Crucible Steel Company of the steel sold under said contract as a security for the payment of the purchase price thereof.*"

Such writings as the one referred to in the foregoing finding of facts, have uniformly been held by the Court of Appeals of Kentucky to constitute a sale and a

mortgage back to the original vendor. Among the cases so holding, are:

Baldwin vs. Crow, 86 Ky., 679.

Wicks Bros. vs. McConnell, 102 Ky., 434.

The above chattel-mortgage never having been recorded, the trustee in bankruptcy of Davis, Kelly & Company, the mortgagors, opposed the allowance of the lien thereunder in so far as the same would affect subsequent creditors of the bankrupt who had no actual notice of the pocket-lien at the time when they extended credit to the bankrupts. None of these subsequent creditors had ever obtained any lien upon the mortgaged property.

The District Court held that this unrecorded mortgage could not be enforced as against the subsequent creditors who had no notice thereof; but it ordered that the proceeds of said mortgaged property be distributed *pro rata* unto said subsequent creditors and said Crucible Steel Company upon their respective claims.

Upon appeal by the Crucible Steel Company to the Circuit Court of Appeals, for the Sixth Circuit, said ruling was reversed and a decree was entered directing that the claim of the Crucible Steel Company be allowed as a lien paramount to the claims of all general creditors.

The decree so rendered is upon page 6 of the Record, and the court's opinion is on page 1.

The sole question, therefore, which was involved, and which is again presented to this court, was as to the rights of these subsequent creditors holding no liens, as against the holder of an unrecorded mortgage of which these creditors had no notice. If the recording laws of the State of Kentucky protect such creditors only who have actually obtained some sort of lien upon the secretly-

mortgaged property, then the decree of the Circuit Court of Appeals herein is correct; but if the laws of Kentucky protect creditors *at large* who have extended credit subsequent to the execution of the mortgage without notice of such secret encumbrance, then, we submit that the decree now appealed from must be reversed.

Thus it will be seen that the question now presented depends wholly upon the recording-acts of the State of Kentucky and the manner in which these acts have been construed by the Kentucky Court of Appeals.

Section 496, of the Kentucky Statutes, provides:

> "No deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deeds shall be acknowledged or proved according to law, and lodged for record."

Acts of a kindred nature may be found in the statutes of practically every State, and we confess that under most of these enactments, as construed by the respective State courts, creditors at large are excluded, and those creditors only who have obtained a *lien* upon the mortgaged property can successfully resist the claim of the holder of the unrecorded mortgage. However, in some of the States where recording acts similar to our own exist, the courts hold that creditors *at large* whose claims arose subsequent to the execution of the secret encumbrance, are protected against secret liens even though these creditors have not themselves obtained any lien upon the encumbered property.

As the solution of the question presented depends entirely upon the construction given to Section 496, of the

Kentucky Statutes, by the Court of Appeals of said State, it is apparent that if there has been such a construction, then *other-state* decisions under their own recording laws must be ignored.

CONSTRUCTION OF SAID STATUTE BY STATE COURT.

For a long period of time in Kentucky the various decisions under this Act were totally irreconcilable, and it would be wholly useless to collate the old varying decisions and to attempt to arrive at a construction of the statute therefrom.

In the case of *Wicks Bros. vs. McConnell,* 102 Ky., 434, the court expressly refers to the confusion arising from the former decisions under this statute, saying:

> "Section 496, Kentucky Statutes, being the same as Section 10, Chapter 24, of the General Statutes, which provides, . . . has been frequently construed by this court; and, as said by Judge Lindsay in Low, etc. v. Blinco (10 Bush, 334), *the decisions are singularly inconsistent with each other.*" (Our italics.)

In the above case (*Wicks vs. McConnell*), the holder of an unrecorded mortgage sought to secure priority over attachment creditors whose claims arose after the execution of the unrecorded mortgage, but without notice thereof. The ground upon which the holder of this unrecorded mortgage sought to maintain his priority was that actual notice of the existence of the mortgage had been given *before the sale under the attachment.*

In support of this latter contention a number of decisions were cited to show that the Court of Appeals of

Kentucky had held that notice of an unrecorded mortgage, given at any time before a sale under an execution or attachment, would arrest such sale and would give the mortgage priority over the execution or attachment lien.

The case of Baldwin v. Crow, 86 Ky. 680, was cited as an example of the application of such principle. It is true that such subsequent notice did, in Baldwin v. Crow, affect the holder of the execution lien and give priority to the mortgage, but this was permitted because of the fact that, in that case, the claim or demand which was reduced to judgment and upon which the execution was issued *arose long before the mortgaged property was acquired*, and thus such creditor could not have relied upon the mortgaged property as part of the creditor's assets upon which credit was extended. The difference between the position of an antecedent creditor and that of a subsequent one was clearly pointed out in the *Wicks-McConnell* case (supra) wherein the court said:

> "It may be said that in that opinion (Baldwin v. Crow) is to be found the first intimation of such a distinction; but, on the other hand, the distinction is there clearly indicated, and is, in our judgment, right and equitable. The holder of an antecedent debt is in no wise defrauded by not being permitted to subject to the payment of his debt property subsequently acquired by his debtor, which is subject to a lien. Moreover, in none of the cases to which we have been referred, in which the holder of a pocket lien has been held to have a claim superior to an execution or attachment creditor, does it appear that the latter's debt was created subsequent to the creation of the lien.
>
> "And while we desire to adhere strictly to the decision and reasoning of the court in the Baldwin case, *supra*, we are not inclined to push the doc-

> trine further than we are required by the language of that opinion in support of secret liens as against creditors whose debts were created, or may reasonably be supposed to have been created, upon the faith of the property being, so far as they could by any possibility discover, unencumbered. If this be not the construction, then the language of the statute 'or against creditors' is entirely nugatory. . . . ."

Near the conclusion of the court's opinion, we find the following:

> "On the one hand, the unrecorded lien is upheld as against creditors who can not be presumed to have given credit upon the faith of the property held in lien. On the other hand, creditors who may be presumed on such faith to have given credit are protected as against the secret lien in the rights which they secure by their diligence in the levy of their execution or attachment. . . . ."

A perusal of the foregoing opinion will show that the only question presented to the court in that case, was whether or not the giving of notice of the unrecorded mortgage before the sale under an attachment taken out by a *subsequent creditor* would give priority to such unrecorded mortgage. When the court said that such *subsequent creditors* "are protected as against the secret lien in the rights which they secure by their diligence in the levy of their execution or attachment," it referred only to the case before the court at that time, namely, to subsequent creditors who had in fact obtained attachment and execution liens. The court did not declare that 'creditors at large' or subsequent creditors who had obtained no specific hold or lien upon the property were not protected by said statute. Such case was not presented, and if the court had declared in that opinion that

only subsequent creditors who had obtained a lien or other hold upon the mortgaged property could successfully resist the priority of the unrecorded mortgage, such declaration would have been wholly outside of the case presented.

Much confusion has arisen in the various cases in bankruptcy in Kentucky as to the construction of this statute since the decision in the *Wicks-McConnell* case, and this confusion is due solely to the attempt to extend the words used in that opinion to a case *not presented* and which was not in the court's mind when the words were used.

The mere statement "that subsequent creditors (who had, in that particular case, obtained attachment and execution liens) will be protected in the rights which they had secured," is certainly not tantamount to a decision that creditors without such liens must be excluded from the protection of the statute.

Since the date of the decision in *Wicks Bros. vs. McConnell*, the Court of Appeals of Kentucky has twice construed the same statute; these two subsequent decisions dispose, absolutely, of any question as to what the court meant in the former case, because in neither of these recent cases did any of the creditors have a lien, but, notwithstanding this fact, the court referred to *Wicks vs. McConnell* as defining their rights.

The first of these two cases is *Besten & Langen vs. Peoples' Messenger & Parcel Delivery Company*, 99 Southwestern Reporter, 631; 30 Ky. Law Reporter, 787.

In that case Besten & Langen sold a wagon and some horses to Best and Fry, the purchase-price being secured by a chattel mortgage which was never recorded. Best

and Fry subsequently formed a corporation, known as "Peoples' Messenger & Parcel Delivery Company," having a capital stock of $2,000.00. Best and Fry put into the corporation the wagon and horses, which they had purchased from Besten & Langen, and received therefor $1,300.00 of the capital stock. A third individual, named Marshall, put into the company $700.00 and received the remaining stock of that amount.

After the corporation thus formed had engaged in business for a time, it made a general assignment for the benefit of its creditors. In the settlement suit thereupon instituted by the assignee, Besten & Langen asserted a lien upon the wagon and horses under their unrecorded mortgage. The trial court held that Besten & Langen had no lien under their unrecorded mortgage, and this was the question considered upon appeal.

Under the facts presented, the Court of Appeals sustained the ruling below, and in its opinion it said:

> "The corporation did not assume the debt to Besten & Langen. It had no notice of the secret lien claimed by Besten & Langen, unless the knowledge of Best & Fry is to be imputed to it, and their knowledge cannot be imputed to Marshall or the creditors. In putting in the wagons and horses in payment of their stock, Best & Fry were dealing with Marshall. They were acting for themselves, and not for the corporation, in this transaction, and notice to them was not notice to the corporation. The creditors of the corporation gave it credit upon the fact that it held and ostensibly owned this property. The secret lien of Besten & Langen cannot be enforced upon the property of the corporation to the prejudice of the bona fide creditors of the corporation whose debts were created subsequently. Wicks vs. McConnell, 102 Ky., 434, 43 S. W. 205. That case has recently been approved by the court.

> Bowles' Executor v. Jones, 96 S. W. 1121, 29 K. L. R. 1022. In Star Drilling Company vs. McLeod, 92 S. W., 558, 29 K. L. R. 84, it did not appear that the creditor's debt was created after the making of the mortgage."

It may be contended that the mortgage was rejected in the foregoing case because the rights of a purchaser (the newly-formed corporation) intervened; but if that had been the sole point to be decided as conclusive of the question, the court would certainly have said that as the corporation obtained its title free from any secret lien, *all its creditors* were entitled to participate in the proceeds of its property. Instead of saying this, the court said:

> "The secret lien of Besten & Langen can not be enforced upon the property of the corporation to the prejudice of the *bona fide* creditors of the corporation *whose debts were created subsequently.*" (Our italics.)

Nor would the court have cited in support of such ruling the cases which it refers to and which deal with *creditors*, not *purchasers*.

Thus we see that in above case the court had to deal with the rights of creditors who had no lien upon the mortgaged property, but who were merely entitled to participate in the distribution of the assigned estate; yet, notwithstanding this, the court refers to *Wicks vs. McConnell*, and therefore it seems clear that the court held, and meant to hold, that under the decision in *Wicks vs. McConnell*, all subsequent creditors, without notice, were protected against secret liens, under Section 496, Kentucky Statutes, irrespective of the fact whether or not they had fastened a hold upon the property by attachment or other character of lien.

A still more recent case, dealing with this statute, which was decided by the Kentucky Court of Appeals, is *Swafford's Admr. vs. Asher*, 105 S. W., 164; 31 Ky. Law Reporter, 1338.

In above case the court again considered the effect of an unrecorded mortgage in so far as the same might affect subsequent creditors of the mortgagor. The settlement of the estate of the deceased mortgagor was involved and the court was called upon to determine the effect of an unrecorded mortgage—not as to lien creditors—but as to creditors having no specific lien of any character. The court said:

> "There is no doubt that, as between Swafford (deceased mortgagor) and Asher (mortgagee), the latter had a lien upon the teams for the advances made, and we perceive no reason why the creditors, none of whose debts are shown to have been subsequent to the mortgage, should stand in a better attitude than the principal, Swafford, would have done if he were alive. As the mortgage was not recorded, it would, of course, not be valid as to creditors whose debts were subsequently created; but as to those whose debts were created prior to the purchase of the teams and the mortgage upon them the lien is valid, although not recorded as required by Section 496 of the Kentucky Statutes of 1903, and, as said before, there is nothing to show that any debt of the estate was created after the purchase of the teams, except that of appellant, who had actual notice. Wicks Bros. vs. McConnell, 102 Ky., 434; 43 S. W., 205; Clift v. Williams, 105 Ky., 559; 49 S. W., 328, 51 S. W., 821; Rankin v. McFarlane Carriage Co., 75 S. W., 221, 25 Ky. Law Rep., 258."

Counsel for appellee may urge that so far as said opinion dealt with subsequent creditors without notice, it was *obiter dictum*, because there were no subsequent

creditors in that case save appellant, and he had notice of the unrecorded mortgage before he became a creditor. This contention does not appear sound, because the only facts there presented to the court, and the only case which it then decided, related to the rights of a creditor whose claim arose after the execution of the mortgage and who had not fastened any hold upon the mortgaged property. If a creditor *at large* could not attack the validity of a prior unrecorded mortgage because of his failure to obtain a hold upon the property by the levy of an attachment or execution, it is reasonable to suppose that the court would have decided against the creditor upon such ground, or, at least, such ground would have been mentioned in connection with the fact of *actual notice* as the reasons for upholding the validity of the unrecorded mortgage. We think the opinion in question shows that the only ground for rejecting the creditor's contention, was because of the fact that this creditor had *actual notice* of the mortgage when his demand was created, and that if this subsequent creditor had not had actual notice of the unrecorded mortgage when he extended credit, such mortgage would have been rejected under the principle laid down in *Wicks vs. McConnell.*

The mere fact that a secret mortgage may be held invalid as to subsequent creditors without notice, does not give such creditors a prior lien or any lien. If they have secured a lien, then the annulment of the secret mortgage will secure to them priority in distribution; but if they are mere general creditors without any lien upon the mortgaged property, then they are entitled only to participate pro rata with the mortgage-holder in the distribution of the proceeds derived from the prop-

erty covered by the mortgage. The effect of such distribution being that while the lien of the mortgage is annulled as to these certain creditors, yet upon such annulment the claims of the mortgage-holder and of the subsequent creditors stand upon an equal footing and therefore no preference in distribution should be given to either.

In the opinion which the United States Circuit Court of Appeals delivered in the case at bar, reference is made to the fact that the opinions in *Besten & Langen vs. Peoples' Messenger Co.*, and in *Swafford's Admr. vs. Asher* (cited by us) were marked by the court delivering them "*not to be reported.*" This meant that the question there decided was neither a new one or of sufficient importance to be again published in the Kentucky Reports; however, the value of those decisions as precedents and authorities was not destroyed or diminished merely because they were marked "*not to be reported.*" At the present time all opinions of the Kentucky Court of Appeals are published in the Kentucky Reports, but the statute requiring that this be done has been in force less than two years.

FEDERAL COURT DECISIONS UNDER THIS STATUTE.

After the decision in *Wicks vs. McConnell*, the first case in the Federal courts which dealt with this same statute was *In re* Sewell, 111 Federal Rep., 791; 7 Am. Bankruptcy Reports, 133. This case arose in a bankruptcy proceeding in the Eastern District of Kentucky and was decided by Judge Cochran. Judge Cochran there held that a creditor who had not obtained a lien by attachment, execution, or otherwise, was not pro-

tected by Section 496 against the lien of the holder of an unrecorded mortgage. Said decision was never reviewed by the United States Circuit Court of Appeals, but thereafter Judge Evans, sitting in the Western District of Kentucky, held *In re Ducker*, 133 Federal 771; 13 Am. Bankruptcy Reports, 760, that *creditors at large*, if they were subsequent creditors without notice of the mortgage, were entitled to the protection under said statute against the lien of the holder of an unrecorded mortgage.

This decision of Judge Evans was reviewed by the Circuit Court of Appeals for the Sixth Circuit, and affirmed. The opinion delivered by the Circuit Court of Appeals is also styled *In re Ducker*, and is reported in 134 Federal, 143, and also in 13 Am. Bankruptcy Reports, 760. Therein the court took up in detail the various decisions preceding *Wicks vs. McConnell*, and then, coming down to that case, it said:

> "An observation was made by Judge DuRelle, in Wicks v. McConnell, 102 Ky. 434, which is much relied upon by appellee. In delivering the opinion of the court, the learned judge used this language: 'On the one hand, the unrecorded lien is upheld as against creditors who can not be presumed to have given credit upon the faith of the property held in lien. On the other hand, creditors who may be presumed on such faith to have given credit are protected as against the secret lien in the rights which they secure by their diligence in the levy of their execution or attachment.'
>
> "This observation was made in a case where the creditor had sued out an attachment and was seeking to enforce his claim to priority as against the holder of the unfiled mortgage. It was not necessary to decide how the claim would stand if there had been no levy. No question of that sort was present or was agitated, and it is not at all prob-

able that the learned judge had in mind that question. . . .

"But in the case of *In re Sewell*, 7 Am. B. R. 133, 111 Fed. 791, Judge Cochran, of the Eastern District of Kentucky, adopted the foregoing statement in Wicks v. McConnell as the basis of his decision, taking it as the settled law of Kentucky. . . . We think he was in error in relying upon the statement in Wicks v. McConnell as settling the law of Kentucky for all cases where such a question might arise under differing circumstances, as, for instance, such a case as Graham v. Samuel, 1 Dana, 166, where there had been no levy either by attachment or execution, but only an equitable lien acquired by the filing a creditor's bill after the return of an execution unsatisfied."

The foregoing opinion of the Circuit Court of Appeals shows that that court regarded *Wicks v. McConnell* as merely deciding the question there presented, and construed it as not excluding *creditors at large*.

That court then held, *In re Ducker*, that subsequent creditors without notice, even though they had no lien or hold upon the mortgaged property, were protected by the statute in question; and then, after stating this as the settled law of Kentucky, the court said that, even if there could be any doubt as to the correctness of this proposition, the holding by the trustee in bankruptcy for the benefit of the bankrupt's creditors gave the subsequent creditors such an equity that they would be protected by the statute under discussion.

Thus the law stood in bankruptcy proceedings in Kentucky until this court decided the case of *York Manufacturing Co. vs. Cassell*, 201 U. S., 344; 15 Am. Bankruptcy Reports, 633.

That case (*York vs. Cassell*) involved a determination as to what construction the courts of Ohio had given to

the *Ohio statute* relating to the recording of "conditional sale agreements." This court concluded that such Ohio statute must be construed under the Ohio decisions as protecting creditors only, who, before the filing of the conditional sale contract for record, had "fastened upon the property" by some specific lien.

As it appeared in that case that certain creditors had obtained no specific lien upon the mortgaged property before the bankruptcy, this court considered the further question whether or not the act of bankruptcy would operate as a seizure in such manner that a lien could be worked out thereunder in favor of the creditors which would enable them to oppose the claim of the holder of the unrecorded mortgage. This court decided against such contention, and held that the trustee in bankruptcy took only the rights and title of the bankrupt, where there are no specific liens; and that consequently none of the general creditors were protected by the Ohio statute.

Under the *York-Cassell* case, it is therefore settled that the act of bankruptcy and the vesting of the bankrupt's property in the trustee do not create a lien or equity in favor of a creditor, which will enable him to resist the lien of an unrecorded mortgage *in those States where such right is not extended to creditors at large.*

Therefore, so much of the decision of the Circuit Court of Appeals in the *Ducker case* (supra) which held that a creditor derived a lien through the trustee's holding in bankruptcy, is now, in effect, overruled by this court; but the independent point decided in the *Ducker* case, to the effect that under the law of Kentucky, as construed

by its Court of Appeals, *all* subsequent creditors without notice were protected against unrecorded mortgages, was in no way affected by the *York-Cassell* decision.

After this decision in *York vs. Cassell*, the question as to the effect of our Kentucky statute was again presented to the United States Circuit Court of Appeals for the Sixth Circuit, *In re Doran*, 154 Federal, 467; 18 Am. Bankruptcy Reporter, 760; and in its decision therein the court concluded that it was bound by the ruling in *York vs. Cassell.*

Upon a review of the case now at bar, the Circuit Court of Appeals accepted the decision in *York vs. Cassell* as decisive, notwithstanding the fact that that decision rested upon the laws of Ohio, which protect creditors only who have some sort of lien, and notwithstanding the fact that said court had itself held, *In re Ducker* (supra), that under the laws of Kentucky all subsequent creditors without notice were protected against the lien of an unrecorded mortgage.

We submit, therefore, that under the laws of Kentucky, as construed by the Kentucky Court of Appeals in the cases which we have cited herein, and as recognized by the Circuit Court of Appeals, *In re Ducker* (supra), all subsequent creditors without notice are protected against the lien of an unrecorded mortgage, and if the property of the debtor comes in any way to be distributed, whether in the settlement of an estate assigned for the benefit of creditors or in the settlement of the estate of a decedent, or in some other manner, no unrecorded mortgage can be enforced as against the claims of those persons who had no notice of the mort-

gage and who extended credit to the debtor after the mortgage was made.

If this is the construction placed upon the Kentucky recording act by the courts of that State, and we maintain it is, then it follows that, under Section 67 a and b of the Bankruptcy Act, the unrecorded mortgage of the Crucible Steel Company can not be enforced as against these subsequent creditors who had no notice of the secret encumbrance.

We quote the two provisions of the Bankruptcy Act, numbered 67 a and b.

> (*a*) Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.
>
> (*b*) Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

In the case at bar it was not contended that these subsequent creditors without notice of the unrecorded mortgage should receive priority in distribution over the Crucible Steel Company; it was contended only that as to such creditors the Crucible Steel Company had no right to a *lien* under its mortgage, but it was conceded by the trustee that the Crucible Steel Company had a right to *prove* its mortgage-debt and then *share pro rata* with these subsequent creditors in the proceeds which might be realized from the property covered by the mort-

gage. The referee so held and this ruling was affirmed by the District Court. We submit, therefore, that this ruling was correct, and we ask that the decree setting aside that ruling be itself reversed.

H. H. NETTELROTH,
Attorney for Appellant.

JOHN C. DOOLAN,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1911.

No. 183.

O. G. HOLT, TRUSTEE IN BANKRUPTCY OF DAVIS KELLY & COMPANY, BANKRUPTS, - - - - - Appellant,

versus

CRUCIBLE STEEL COMPANY OF AMERICA, - - - - - - Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Under Ky. Stats., Sec. 496, an unrecorded chattel mortgage lien is good as against subsequent creditors who have not reduced their claims to liens.

Brief on Behalf of Appellee.

WM. MARSHALL BULLITT,
KEITH L. BULLITT,
Counsel for Appellee.

BRUCE & BULLITT,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

QUESTION INVOLVED.

Is an unrecorded chattel mortgage valid under Ky. Stats., Sec. 496, as against subsequent creditors who have not reduced their claims to liens.

STATUTE OF KENTUCKY INVOLVED.

Section 496, Kentucky Statutes, which provides:

"No deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deeds shall be acknowledged or proved according to law, and lodged for record."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 183.

O. G. HOLT, TRUSTEE IN BANKRUPTCY OF DAVIS KELLY & CO., BANKRUPTS, - - *Appellant,*

versus

CRUCIBLE STEEL COMPANY OF AMERICA, - - *Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLEE.

This is an appeal from a judgment of the United States Circuit Court of Appeals for the Sixth Circuit (Lurton, C. J., Severens and Warrington), reversing a judgment of the District Court of the United States for the Western District of Kentucky, denying to the Crucible Steel Company a lien upon certain property mentioned in an unrecorded mortgage as against various creditors of the bankrupt estate whose debts were created subsequent to the date of said mortgage, and whose claims had not been reduced to liens.

STATEMENT OF THE CASE.

On January 7, 1908, the Crucible Steel Company sold and delivered to Davis Kelly & Co. certain steel at a price aggregating about $15,000.00. The purchase price was payable in installments. The agreement provides *inter alia* as follows:

> "Title to all goods, however, to remain in our name until such time as the money is received by us."

This contract was not recorded in the Jefferson County Court Clerk's office.

At the time the contract above mentioned was executed Davis Kelly & Co. were owing a considerable amount to various creditors. After January 7, 1908, and before the bankruptcy, Davis Kelly & Co. created other debts aggregating approximately $5,000.00.

None of the creditors of Davis Kelly & Co. instituted attachment suits, nor endeavored in any other manner to reduce their claims against the property of Davis Kelly & Co. to *liens.*

On the 22d day of April, 1908, Davis Kelly & Co. were adjudged bankrupts.

On institution of the bankruptcy proceedings the Crucible Steel Co. proved its debt secured by its mortgage lien as aforesaid and claimed preference upon such part of the goods covered by the contract of January 7, 1908, as remained unsold in the hands of Davis Kelly & Co.

The facts as hereinabove recited are admitted by both parties, as shown by the "Finding of Facts," (Rec. 3, 4) endorsed as correct by counsel for both parties.

The Referee in bankruptcy adjudged that Crucible Steel Company of America had no lien under its mortgage upon any of the property or effects of the bankrupts as against creditors whose debts were contracted subsequent to the date of said mortgage.

The Crucible Steel Company thereupon prayed for a review of that judgment by the District Court, insisting that its mortgage lien was superior to that of all general unsecured creditors, whether their debts accrued before or after the execution of the mortgage.

The District Court denied the petition of the Crucible Steel Company for a review and affirmed the Referee's order.

From this decree the Crucible Steel Company prosecuted on appeal to the U. S. Circuit Court of Appeals for the Sixth Circuit, which reversed the judgment of the District Court and held that the mortgage lien of Crucible Steel Company was superior to the claims of those subsubsequent creditors who had not reduced their claims to liens. (*O. G. Holt, trustee,* v. *Crucible Steel Co.,* 174 Fed. 127.)

From that decree the Trustee prosecutes this appeal.

QUESTION INVOLVED.

The sole question involved upon this appeal is whether the unrecorded mortgage lien held by the Crucible Steel Company against Davis Kelly & Co. is superior to the claims of general unsecured creditors who extended credit to Davis Kelly & Co. after January 7, 1908, the date of the mortgage, or whether said mortgage lien is only co-ordinate with such claims.

We submit that the decisions of the Kentucky Court of Appeals and of the courts of the United States are clearly to the effect that such mortgage takes precedence over the debts created subsequent to the execution of the mortgage and which have not been reduced to liens by attachment or otherwise.

FIRST POINT.

The Contract of January 7, 1908, Between Crucible Steel Company and Davis Kelly & Co., is in Effect a Mortgage for the Purchase Price of the Steel.

The authorities in Kentucky are unanimous in sustaining the above proposition. A similar contract was held to be a mortgage in

Baldwin v. *Crow*, 86 Ky. 679.
Wicks v. *McConnell*, 102 Ky. 434, 436.
Swafford's Admr. v. *Asher*, 31 K. L. R. 1338.

The fact that the contract is to be treated as an unrecorded mortgage is indeed conceded by all parties.

SECOND POINT.

The Lien of the Unrecorded Mortgage of the Crucible Steel Company is Superior to that of General Unsecured Creditors Whose Debts Were Created Subsequent to the Execution of the Contract, to wit, January 7, 1908.

The determination of this question depends solely upon a proper construction of Section 496, Kentucky Statutes. Said section reads as follows:

> "No deed, or deed of trust or mortgage * * * shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors until such deeds shall be acknowledged or proved according to law and lodged for record."

The pivotal question revolves about the meaning of the word "creditors" as used in the section of the statutes above quoted.

The Crucible Steel Company insists that the word "creditors" as used in the statute includes only those creditors who by attachment or otherwise have *reduced their claims to a lien* upon the property covered by the unrecorded mortgage.

The Trustee, on the other hand insists that the word "creditors" embraces all creditors (whose debts were created subsequent to the execution of the mortgage), whether or not their claims have been *reduced to a lien* on the property covered thereby.

Since the passage of the Act above referred to, the general rule in Kentucky, and in other jurisdictions

wherein similar statutes have been construed, has been well established that the term "creditors," as used in the statutes, does not embrace general unsecured creditors, but embraces only those who by judgment, attachment, or otherwise have obtained an interest in or a lien upon the property covered by the unrecorded mortgage.

Upon behalf of the Trustee, however, it is contended that by a decision of the Court of Appeals of Kentucky in *Swafford's Admr.* v. *Asher,* 31 K. L. R. 1338, and in*Besten & Langan* v. *Peoples Messenger Co.,* 99 S. W. 631, 30 K. L. R. 787, the rule in Kentucky has been so changed as to include within the meaning of the word "creditors" all creditors whose debts were created subsequent to the execution of the unrecorded mortgage; and that inasmuch as the Federal courts in dealing with a State statute should follow the construction placed upon the statute by the courts of that State, the decision of the District Court holding the unrecorded mortgage of the Crucible Steel Company invalid as against subsequent creditors was correct.

The cases referred to were carefully considered by the Circuit Court of Appeals in the case at bar, and that court was of the opinion that neither case was designed by the Kentucky Court of Appeals to change the rule theretofore prevailing.

We submit the following propositions:

First: The rule in Kentucky prior to the decisions in *Swafford's Admr.* v. *Asher,* 31 K. L. R. 1338, and in *Besten & Langan* v. *Peoples Messenger Co.,* 99 S. W. 631, and the general rule throughout the United States, has been

that the term "creditors" includes only those who by judgment, attachment, or otherwise have obtained an interest in or a lien upon the property covered by the mortgage.

Second: The rule in Kentucky has not been changed by the decisions rendered in *Swafford's Admr.* v. *Asher*, 31 K. L. R. 1338, and in *Besten & Langan* v. *Peoples Messenger Co.*, 99 S. W. 631.

Of these in their order.

I.

The Rule in Kentucky Prior to the Decision in Swafford's Admr. v. Asher, 31 K. L. R. 1338, *and in* Besten & Langan v. Peoples Messenger Co., 99 S. W. 631, *and the General Rule Throughout the United States, has been that the Term "Creditors" Includes only those why by Judgment, Attachment, or Otherwise have Obtained an Interest in or a Lien Upon the Property Covered by the Mortgage.*

In construing statutes similar to the Kentucky Statutes, the courts of New York, Texas, Illinois and Nebraska have uniformly held that only those creditors who have reduced their claims to liens are protected against unrecorded mortgages.

In *Button* v. *Rathbone*, 124 N. Y. 538, the court defines the term as follows:

> "The term 'creditor of the mortgagor' has been defined by these decisions to be a creditor armed with some legal process which authorizes him to seize the property, such as an execution issued upon a

judgment, or an attachment. A mere creditor at large, without some process for the collection or enforcement of his debt, is not in position to question an unfiled mortgage given by his debtor which is otherwise valid. * * *

"When a conveyance is said to be void against creditors, the reference is to such parties when clothed with their judgments and executions, or such other titles as the law has provided for the collection of debts."

In *Overstreet* v. *Mannering*, 67 Texas, 657, the court says:

"In the case of Grace v. Wade, 45 Texas, 527, it was held under the Act of February 5, 1840, which protected creditors and subsequent purchasers without notice against prior unrecorded mortgages and conveyances of property, that by the word 'creditor' was meant creditors who had acquired some character of lien upon the property. This is still the recognized law of our State. * * *This, too, is the meaning attached to it by the decisions of other States having chattel mortgage acts similar to our own."

American-English Encyclopedia of Law, Vol. VIII, page 241, lays down the rule as follows:

"In some States recording acts provide that unrecorded conveyances shall be void as against creditors. The term 'creditor,' however, has been frequently held not to include creditors at large, but is confined to judgment creditors and those who have in some other manner effected a lien on the debtor's property, so where statutes require chattel mortgages to be registered for the protection of creditors, it has been held that a mere creditor at large is not within the protection of the statute."

In *Ayres* v. *Duprey*, 27 Texas, 593, 86 Am. Dec. 657, 667, the court in construing a statute similar to the Kentucky Recording Statute holds in accordance with the general rule that the statute includes only such creditors as have acquired some character of lien.

The court says:

> "Does the statute extend to every class of creditors, or are such only as have acquired some character of lien recognized by law as within its protection? There may be cases in our court, without the question having been especially adverted to, which have gone upon the doctrine of all creditors being within the law, though, if so, we can not at present call them to recollection. * * * But we presume there can be but little doubt either in principle or authority in saying that only such creditors as have secured some character of lien upon the land before notice of the unrecorded deed are within the protection of the statute. The creditor can not object to the sale of the property by the debtor before his lien has attached to it. * * * It is sometimes said that creditors should be protected unless they had notice at the time credit was given, because the credit is extended upon the faith of the debtor's owning the property, if the title is then standing in his name. But this argument, if it is good for anything, proves too much. If the principle was sound, it would follow from it that the creditor's right to a satisfaction of his debt out of the property owned by the debtor at the time credit is given him is superior to the claims of those subsequently dealing with him. The unrecorded deed is good between the parties; the grantee then has dealt with the grantor, and paid the consideration for the land upon the faith of the effectuality of his title, and that it will not be swept from him by liabilities directed by the grantor; why, then, does he not occupy as favorable a position as

a general creditor? If he does, and we think it can not be doubted, the record of his deed or notice to the creditor before any specific right of the latter has attached to the land, should operate for his effectual security."

In *McFadden* v. *Worthington*, 45 Ill. 365, it was held that:

"A creditor within the meaning of Section 23 (Rec. Act similar to Ky. statute) is one who, without actual or constructive notice of a prior conveyance or incumbrance, institutes such proceedings or takes such steps as effect a lien on the land, before the recording of such conveyance or incumbrance, whether the debt be prior or subsequent to them, and whether the vendor, at the time of conveying or incumbering had other property sufficient to pay the debt or not."

See also:

Stewart v. *Beale*, 7 Hun. (N. Y.) 405.
Ransom v. *Schmela*, 13 Neb. 77, 12 N. W. 926.
Grace v. *Wade*, 45 Texas, 527.

As hereinabove stated, the rule in Kentucky is in exact accord with that in other jurisdictions, as shown in the above cases.

In *Citizens Savings Bank* v. *Hibbs*, 11 Ky. Law Rep. 441, the court says:

"If, during the pendency of attachment proceedings, the holder of an unrecorded mortgage executed *before the levy of the attachment* asserts his lien, he will be adjudged preference over the attaching creditor."

In *Underwood* v. *Ogden*, 6 B. Monroe, 606 (Ky.), the rule is stated as follows:

> "A creditor, in legal contemplation, is one who has recovered judgment. And to entitle a creditor, as such, to take advantage of an unrecorded mortgage, he should show that he had *recovered judgment and sued out execution*, at least before notice of the unrecorded mortgage, if even anything less than a levy and sale before actual notice of the mortgage would suffice, in a court of equity, to deprive the mortgagee of his prior equity. Underwood has not shown himself to be a creditor, by judgment and execution against Henry, whereby any such lien is created in his favor against the property mortgaged as will enable him to take advantage of the omission of Ogden to record his mortgage, and especially when the same was not purposely withheld from the record, with a view to cover over and conceal the lien from creditors."

In *Bailey & Carter* v. *Welch*, 4 B. Monroe, 244 (Ky.), the court in holding that a creditor, whose debt was created after the execution of an unrecorded mortgage, is not entitled to priority over the mortgagee, says:

> "Their equity in the specific property or fund attached, commenced only with the service of the attachment; and having actual notice of the defendant's prior equity before they acquired any legal advantage, they, as complainants in a court of equity, will not be permitted to overreach it."

In *United States Bank, etc., v. Huth*, 4 B. Monroe, 423, 451 (Ky.), the rule is laid down as follows:

> "We would further remark that it is obvious that the complainant in this case, before he filed his bill,

> *or any lien attached in his favor*, had actual notice of the assignment, in trust of all the property and claims which he is seeking to subject to the payment of his demand. And it has been determined by this court that such actual notice, before any lien attached in his favor, will preclude a complainant from obtaining relief, in equity, against such property, though the deed conveying it has not been recorded, as required by the statute."

In *Wicks Bros.* v. *McConnell*, 102 Ky. 434 (decided in 1897), the rule laid down in the above cases was again recognized.

The court, after holding that a creditor whose debt was created prior to the execution of the unrecorded mortgage was not entitled to priority over the mortgagee, states that it is not inclined to push the doctrine further than required by the language of former decisions of the court. The court then points out the class of creditors contemplated by the statute, as follows:

> "There must be some class of creditors to which this language (of the statute) applies. The law gives to the execution or attachment creditor a lien. The law also provides that a mortgage shall not affect him, except from its recording; and equity and good conscience do not require the court to disregard the will of the Legislature, and inflict upon creditors whose equity is superior to that of the mortgagee the evils which the statute was designed to restrain."

FEDERAL COURT DECISIONS.

The question under discussion has in several instances been presented before the courts of the United States and in no case has any court of the United States given to the word "creditors" as construed by the Kentucky Court of Appeals a different interpretation from the one contended for by us.

The question has arisen in the following cases:

In Re Sewell, 111 Fed. 791.
In Re Ducker, 134 Fed. 48.
York Mfg. Co. v. *Cassell*, 201 U. S. 344.
In Re Doran, 154 Fed. 471.

In *In Re Sewell*, 111 Fed. 791, the court in holding that under the Kentucky doctrine a creditor who has not reduced his claim to a lien does not fall within the protection of the statute, refers to the case of *Wicks* v. *McConnell*, and the other Kentucky cases in support of its decision.

The court says:

> "In the extract from the opinion in the case of *Wicks* v. *McConnell* quoted above the creditors who are said to be entitled to protection against a secret lien are those who have acquired rights 'by their diligence in the levy of their execution or attachment.' In that case the contesting creditors had an attachment lien on the property which was the subject of the litigation. In the case of Graham v. Samuel, *supra*, he had acquired an equitable lien by a suit in equity to subject the property to the payment of a personal judgment against the debtor upon which an execution had been issued and returned

'no property found.' In all the other cases the creditors had obtained a hold upon the property by the levy of an execution. In the case of Baldwin v. Crow, the property had not been sold and the litigation was between the holder of a secret lien and the sheriff who had taken the property under the execution. In the other execution cases the property had been sold under the execution and the litigation was between the holder of the unrecorded deed or mortgage on the one hand and the purchaser on the other; the purchaser in most cases not being the execution creditor, but relying on the rights of such creditor to protect his purchase.

"It being essential then that a contesting creditor shall have a hold of some sort on the property in order to be in a position to call in the aid of the statute, we are brought up to the question of whether creditors who have a hold thereon under and by virtue of a general deed of assignment for the benefit of creditors or an assignment in bankruptcy are within the purview of the statute."

The court having held that the creditor is not entitled to claim the benefit of the statute unless he has either reduced his claim to a lien or procured some other equivalent grip upon the property, then holds that a mere assignment in bankruptcy is not sufficient to give such a hold as is equivalent to a lien and thus bring the creditor within the purview of the statute.

In *In Re Ducker,* 134 Fed. 44 (decided January, 1905, Lurton, Severens and Richards, Circuit Judges) it is apparent that the line of Kentucky authorities cited above were not presented to the court. The court apparently was referred only to the case of *Wicks* v. *McConnell,* 102 Ky. 434, as supporting the lien of the unrecorded mortgage, and the court expressed the opinion that the

decision in the case of *Wicks* v. *McConnell* was not, in itself, sufficient to establish that under the settled law in Kentucky a creditor must reduce his claim to a lien in order to become entitled to the protection of the statutes.

The court however holds that whether or not the Kentucky rule be as was held in the case of *In Re Sewell*, that nevertheless the assignment in bankruptcy was such a seizure for the benefit of creditors as was equivalent to an attachment lien and therefore was sufficient to bring the creditors within the protection of the statute.

In *York Mfg. Co.* v. *Cassell*, 135 Fed. 52, there was involved the construction of an Ohio Statute similar to the Kentucky Statute, which had been held by the Ohio Courts to give no protection to a creditor who has not reduced his claim to a lien. On appeal to the Circuit Court of Appeals for the Sixth Circuit, that court, following its ruling in the case of *In Re Ducker*, 134 Fed 44, held that the adjudication in bankruptcy was equivalent to a lien and therefore brought the unsecured creditors within the protection of the statute.

The Supreme Court of the United States on appeal (*York Mfg. Co.* v. *Cassell*, 201 U. S. 344) reversed the decision of the Circuit Court of Appeals and held that the adjudication in bankruptcy was not equivalent to a lien and therefore did not bring a creditor within the protection of the statute in those jurisdictions where the court had construed the word "creditors" used in the statute to mean lien creditors.

In *In Re Doran*, 154 Fed. 468, the Circuit Court of Appeals for the Sixth Circuit (Lurton, Severens and Rich-

ards, Circuit Judges) again had before it the same question involved in the case above cited. As an original proposition, the court intimated a disapproval of the construction placed by the Kentucky courts upon the statute, but held that under the decisions in Kentucky a creditor is not protected by the statute unless he has reduced his claim to a lien.*

The court says:

> "But the construction of the statute is one for the courts of the State, and not for us. The decisions in Kentucky have not been uniform in regard to the effect of the statute in question, but we think it must be conceded they tend in the direction of applying it in the case of creditors to the conditions which exist when the remedy is sought and relegate the question of right to the question of activity and diligence in prosecuting the remedy."

The case at bar (*O. G. Holt Trustee* v. *Crucible Steel Co.*, 174 Fed. 127) was the next case that involved a construction of the statute. The Circuit Court of Appeals for the Sixth Circuit (two of the Judges having been members of the court which decided the cases of *In Re Ducker*, and *In Re Doran*), following its ruling in the case of *In Re Doran*, and the ruling of the Supreme Court in *York Mfg. Co.* v. *Cassell*, 201 U. S. 344, held the lien of Crucible Steel Company superior to the claim of the unsecured creditors.

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* The court then referred to the case of *York Mfg. Co.* v. *Cassell*, 201 U. S. 344, and following the decision in that case held that the adjudication in bankruptcy was not sufficient to constitute a lien and therefore the unsecured creditors were not protected by the statute.

The court said:

> "Accepting, then, the decision in the case of York Mfg. Co. v. Cassell as authoritative, what were the respective rights of the Crucible Steel Company and the bankrupt in the goods in question as the date of the filing of the petition? As between them the mortgage was valid, though not recorded. No creditor had fastened any lien upon them, although several of them were in a condition, and had a right, to do so. These two facts were regarded as decisive by the Supreme Court in the case referred to, and they seem equally decisive here.
>
> "In the case entitled *In re* Doran, 154 Fed. 467, 83 C. C. A. 265, we discussed at some length the meaning and effect of the Kentucky statute relating to the recording of chattel mortgages, and as to whether general creditors are protected thereby; but we felt constrained to abide by the opinion of the Supreme Court in York Mfg. Co. v. Cassell as settling the grounds upon which cases of this sort must be determined. In the Doran case the chattel mortgage had been filed before the filing of the petition. In the present case it had not. But we can not perceive that the difference is important. The mortgage was valid as between the mortgagor and the mortgagee, whether recorded or not, and there is no express definition by the statute which extends the meaning of the word 'creditors,' so as to include general creditors having no lien."

It appears, therefore, that the general rule throughout the United States is well established that the term "creditors" as used in the recording statutes embraces only those creditors who have by appropriate proceedings reduced their claims to a lien, and that the rule in Kentucky is in accord with the general rule unless, as is insisted by appellee, it has been changed by the de-

cisions in *Swafford's Admr.* v. *Asher*, 31 K. L. R. 1338; and *Besten & Langan* v. *Peoples Messenger Co.*, 99 S. W. 631.

We pass, therefore, to a consideration of

II.

The Rule in Kentucky Has Not Been Changed by the Decisions Rendered in Swafford's Admr. v. Asher, 31 K. L. R. 1338; *and in* Besten & Langan v. Peoples Messenger Co., 99 S. W. 631.

In *Swafford* v. *Asher*, 31 K. L. R. 1338, the facts are as follows:

One William Swafford, under contract with A. B. Asher, was engaged in hauling timber for the latter. Having no capital, he induced Asher to advance certain money for the purpose of buying teams for use in carrying out the contract.

In order to secure Asher for the advance, Swafford executed to Asher a mortgage on the teams, which mortgage was never recorded. Swafford died before the completion of the contract, and D. L. Walker, his administrator, having notice of the unrecorded mortgage, undertook to complete the contract. After the completion of the work Asher claimed his lien on the teams to secure him in the advancements made to Swafford during his lifetime.

The trial court adjudged Asher to be entitled to his lien. The administrator objected to the judgment upon the ground that the mortgage, not having been recorded,

was not valid as against him. This was the sole question in the case relative to the validity of the unrecorded mortgage.

The decision of the court is solely to the effect that, inasmuch as there were no creditors whose debts were created subsequent to the execution of the mortgage, except the administrator, who had notice of the same, the mortgage was, in accordance with the authority contained in *Wicks Bros.* v. *McConnell,* 102 Ky. 434, valid.

The court says:

> "There is no doubt that as between Swafford and Asher, the latter had a lien upon the teams for the advancements made, and we perceive no reason why the creditors, none of whose debts are shown to have been subsequent to the mortgage, should stand in a better attitude than the principal, Swafford, would have done if he were alive. As the mortgage was not recorded, it could, of course, not be valid as to creditors whose debts were subsequently created, but as to those whose debts were created prior to the purchase of the teams and the mortgage upon them the lien is valid, although not recorded as required by Section 496 of the Kentucky Statutes; and as said before, there is nothing to show that any debt of the estate was created after the purchase of the teams except that of appellant, who had actual notice. (*Wicks Bros.* v. *McConnell,* 102 Ky. 434; *Clift* v. *Williams,* 105 Ky. 559; *Rankin* v. *McFarlane Carriage Co.,* 25 K. L. R. 258.)"

It appearing, therefore, that the sole question involved was whether or not the lien was valid as to the administrator *who had notice of the mortgage,* it follows that any expression as to some other question is pure dictum, and not such as to warrant a belief that the court

intended to overrule a long line of previously decided cases and change a well-established rule upon a question which was not before the court and the solution of which was wholly unnecesary to a decision in the case before it.

We submit that not only did the court not intend by a mere dictum to change the well-established rule, but that, by a reasonable interpretation of the words used by the court in the Swafford case, it can not be seriously contended that the expression relied on by appellant contradicts that rule in any respect.

The language relied on by appellant is as follows:

> "As the mortgage was not recorded, it could not be valid as to *creditors* whose debts were subsequently created, but as to those whose debts were created prior to the purchase of the teams and the mortgage upon them, the lien is valid, although not recorded as required by Section 496 of the Kentucky Statutes."

It will be observed that the court was not discussing the meaning of the word "creditors"; the question as to what class of creditors is intended by the statute was not involved nor in any way mentioned in the case. The sole question under discussion concerned merely the relative rights of creditors whose debts were created prior to the execution of the mortgage, and those whose debts were created subsequent thereto. The court, therefore, in using the word "creditors" must have used it as it is used in Section 496 of the Kentucky Statutes, and no light is thrown or attempted to be thrown upon what class of creditors is to be considered included in the word "creditors."

We are necessarily, therefore, thrown back upon the statute itself and the various decisions construing the same in order to ascertain the meaning of that word as used by the court. Upon being thus thrown back upon the statute and the decisions construing the same, we are brought to a reconsideration of the line of Kentucky authorities cited above, which are unanimous in holding that the word creditor as used in the statute means only such creditor as has reduced his claim to a lien by attachment or other appropriate proceeding.

It is to be presumed that the court who rendered the decision in Swafford v. Asher knew the law and was familiar with its own decisions. It is inconceivable that that court in using a word which had been construed numerous times in previous decisions would have intended to use it with a new and a different meaning without expressly saying so.

The contention made by appellant can only mean that the use of the term "creditors," coupled with a failure to *expressly declare* that it was used in accordance with the meaning give to it in previous adjudged cases, indicated an intention to overrule the earlier cases defining the term and to give to it a new meaning in express conflict with the one already adopted by the court. Were such a position tenable, it would necesarily follow that the courts would be compelled to so elaborate every opinion as to define every term used whose meaning has been fixed by the court in previous cases, or be in danger of being construed as overruling all previous cases defining the term. The argument of counsel for appellant, when

traced to its logical conclusion, leads to an absurdity.

It may be further observed that the court, in support of its decision, cites the case of *Wicks* v. *McConnell,* 102 Ky. 434, which, as we have pointed out above, defines a creditor within the contemplation of the statute to be one who has acquired a lien by execution, attachment or otherwise.

Is it conceivable that the court, if intending to overrule *Wicks* v. *McConnell,* would have given that case as its authority for so doing? We think not.

In *Besten & Langan* v. *Peoples Messenger Co.,* 99 S. W. 63 (Ky.), the facts are as follows:

Besten & Langan sold to Best & Fry, a partnership, a wagon and three horses, retaining a mortgage as security for the unpaid purchase price. The mortgage was not recorded. Subsequently, the Peoples Messenger & Parcel Delivery Co., a corporation, *without notice* of the mortgage, *bought* the property from Best & Fry, giving value therefor.

The Peoples Messenger & Parcel Delivery Co. subsequently failed and made an assignment for the benefit of its creditors. Besten & Langan thereupon claimed a lien upon the horses and wagon superior to the claims of the creditors of Peoples Messenger & Parcel Delivery Co.

The Kentucky Court of Appeals very properly rejected Besten & Langan's claim and held that it had no claim to the property as against the creditors of the corporation.

In the opinion of the court appears the following words:

"The creditors of the corporation gave it credit upon the fact that it held and ostensibly owned this property. The secret lien of Besten & Langan can not be enforced upon the property of the corporation to the prejudice of the *bona fide* creditors of the corporation *whose debts were created subsequently.* Wicks v. McConnell, 102 Ky. 434."

Counsel for appellant has seized upon the above words on the assumption that they disclose a purpose upon the part of the court to hold that an unrecorded mortgage is invalid as to *all* subsequent creditors of the mortgagor without notice.

Counsel, we submit, has wholly misconceived the facts of the case and the effect of the opinion. He perceives an analogy between that case and the case at bar where none exists.

In the case at bar the "subsequent creditors" who attack the unrecorded lien of the Crucible Steel Co. are the creditors of Davis Kelly & Co., *its mortgagors.*

In the Besten & Langan case the creditors who questioned the unrecorded lien of Besten & Langan were not the creditors of Best & Fry, their mortgagors; but creditors of a corporation to whom Best & Fry had *sold the property in question for value* and *without notice* of the lien.

Title and possession being vested in Best & Fry, subject only to an unrecorded lien, a *bona fide* sale by them, without notice to the purchaser of the existence of the lien, unquestionably vested in such purchaser a title free of the lien (Ky. St., Sec. 496).

The words "whose debts were created subsequently"

in the opinion quoted above, were clearly inadvertent; they are indeed wholly without force or meaning.

The title having vested in the corporation by its purchase from Best & Fry, free of the lien of Besten & Langan, that lien could not be enforced as against the corporation, and consequently could not be enforced against its creditors. The question as to the date of the creation of such debts was utterly immaterial.

This would seem to be sufficient to exclude the Besten & Langan case from consideration as an authority in the case at bar.

The earnestness with which it is relied on by appellant's counsel, however, may excuse a further brief consideration of it.

If that case, in fact, changed or was designed to change the long-established rule on the subject in Kentucky, its very grave importance could not have escaped the Kentucky Court of Appeals. If it was intended to change a rule of law so important, so carefully considered, and so frequently announced, it may be considered certain that the case of Besten & Langan would have been "reported." Courts do not overrule a long line of previous decisions in "unreported cases."

The opinion is marked, however, "not to be officially reported."

That fact is sufficient to demonstrate that it was not designed to have the effect contended for.

The partial quotation in appellant's brief, from the opinion in the Besten & Langan case, is wholly insufficient to give the full or real meaning of the court.

A reading of the case as a whole will show that the question of priority as between a mortgagee and creditors of the mortgagor was not involved.

The Court of Appeals, after calling attention to the fact that Best & Fry were not the sole stockholders in the corporation (especially referring to Marshall as an individual stockholder), says:

> "The corporation did not assume the debt to Besten & Langan. It *had no notice* of the secret lien claimed by Besten & Langan, *unless* the knowledge of Best & Fry is to be imputed to it, *and their knowledge can not be imputed to Marshall or the creditors.* In putting in the wagons and horses in payment of their stock, Best & Fry were dealing with Marshall. They were acting for themselves, and not for the corporation, in this transaction, *and notice to them was not notice to the corporation.* The creditors of the corporation gave it credit upon the fact that it held and ostensibly owned this property. The secret lien of Besten & Langan can not be enforced upon the property of the corporation to the prejudice of the *bona fide* creditors of the corporation whose debts were created subsequently. Wicks v. McConnell, 102 Ky. 434, 43 S. W. 205. That case has recently been approved by the court. Bowles' Executor v. Jones, 96 S. W. 1121, 29 Ky. Law Rep. 1022."

The "creditors" referred to by the court are not the creditors of Best & Fry, the mortgagor. They are creditors of the corporation, itself a purchaser from the mortgagor for value, without notice of the unrecorded lien, expressly and unquestionably protected by the statute. (Ky. St., Sec. 496.)

The sole question involved was whether such a purchaser takes title free from the lien of an unrecorded

mortgage. If he does, it necessarily follows that his vendees, mortgagees, or creditors take a good title. They derive their title or other interest from the *purchaser,* and not from the mortgagor.

The court held that the corporation, being an innocent purchaser, for value, from the mortgagor, took the property free from the lien of Besten & Langan.

The unrecorded mortgage of Besten & Langan was held invalid against the creditors of the Peoples Messenger & Parcel Delivery Co., not by reason of the protection given in the statute to "creditors," but by reason of the title given by the statute to the *purchaser,* Peoples Messenger, etc., Co.

In the construction of every judicial opinion, it is necessary to interpret the meaning of words in the light of the subject under discussion. Under that light it is manifest that the reference in the Besten case to "subsequent creditors" was purely inadvertent. It does not rise even to the dignity of *dictum.*

The question was not before the court, there was no such contention made by counsel, and the court in discussing the relative priorities between creditors whose debts were created prior to the execution of the mortgage and those whose debts were created subsequent thereto manifestly intended to use the word "creditors" in accordance with the construction already placed upon that word by the unbroken line of decisions of that court.

In conclusion, it may be observed that the court cites with approval *Wicks* v. *McConnell,* 102 Ky. 434, and *Bowles* v. *Jones,* 96 S. W. 1121 (Ky.), both of which desig-

nate as a "creditor" within the meaning of Sec. 496 one who, by attachment or otherwise, has acquired a lien upon the property in controversy.

It may be considered as certain that if the court, in the Besten & Langan case, intended to reverse its previous rulings on this subject, it would not have referred with approval to these cases.

Even more conclusive is the fact that in *Swafford* v. *Asher,* decided but a few months later, the Besten & Langan case is not even referred to.

The Circuit Court of Appeals in deciding the case at bar (*O. G. Holt, Trustee,* v. *Crucible Steel Co.,* 174 Fed. 127) referred to the Besten & Langan case and the Swafford v. Asher case and held that neither case was designed by the Kentucky Court of Appeals to change the rule theretofore announced by that court. The Circuit Court of Appeals said:

> "Since the decision in the Doran case, in which we noticed the apparently conflicting cases in the Kentucky Reports concerning the effect of the statute above quoted, counsel have discovered a case, marked 'not to be reported,' in 99 S. W. 631, Besten & Langan v. Peoples Mess., etc., Co., and they refer to a recent case, Swafford's Admr. v. Asher, 105 S. W. 164, and claim from them it is shown that the Court of Appeals has finally settled the law to be that general creditors who have become such while the mortgage remained unfiled are to be protected. The court below seems to have so held, and some of the language of the judges who delivered opinions in those cases seem to favor that construction. But there was no determination by the court which disposes of the uncertainty we encountered in the Doran

case, but notwithstanding which we gathered the impression that the trend of the State decisions was against the contention of the trustee. We think we ought not to overrule our decision without a more positive demonstration that the law of Kentucky is to the contrary of what we there held."

CONCLUSION.

As shown above, the general rule throughout the United States has been that the term "creditor," as used in the recording acts, means such a creditor as has reduced his claim to a lien, and the question having been raised numerous times in Kentucky, has been uniformly decided by the Court of Appeals of that State in accordance with the general rule. We submit that there is nothing in the case of *Swafford* v. *Asher,* 31 K. L. 1338, or in the case of *Besten & Langan* v. *Peoples Messenger Co.,* 99 S. W. 63, to indicate that the court intended to change the rule.

We submit that the decree of the Circuit Court of Appeals should be affirmed.

WM. MARSHALL BULLITT,
KEITH L. BULLITT,
Counsel for Appellee.

BRUCE & BULLITT,
Of Counsel.

February 22, 1912.

HOLT, TRUSTEE IN BANKRUPTCY OF DAVIS, KELLY & CO., *v.* CRUCIBLE STEEL COMPANY OF AMERICA.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 183. Argued March 4, 1912.—Decided April 1, 1912.

Under § 67a of the Bankruptcy Act of 1898, the effect to be given to an unrecorded chattel mortgage must be determined by the recording law of the State.

As construed by the highest court of the State, the term "creditors" as used in § 496, Kentucky Statutes, 1903, which declares that no mortgage shall be valid against purchasers without notice or creditors until recorded does not include antecedent creditors, or subsequent creditors whose claims are acquired with notice, but does include subsequent creditors without notice, who by diligence secure a specific lien before the mortgage is recorded; but that court has not specifically decided whether the term includes subsequent creditors without notice who have not so secured such lien.

The Circuit Court of Appeals having held that under the decisions of the highest court of the State bearing on the question, the term "creditors" as used in § 496, Kentucky Statutes, 1903, does not include subsequent creditors without notice who have not secured a lien on the property prior to the recording thereof, and this court not being able to say that such construction is wrong, *held* that the title of the holder of an unrecorded chattel mortgage on property in Kentucky is valid and effective as against the trustee in bankruptcy as to the creditors who became such after the mortgage was given and who had not fastened any lien on the property prior to the proceeding in bankruptcy.

174 Fed. Rep. 127, affirmed.

THE facts, which involve priority of claims against the bankrupts' estate, are stated in the opinion.

Mr. H. H. Nettelroth, with whom *Mr. John C. Doolan* was on the brief, for appellant:

The contest is a proceeding in bankruptcy between the

holder of an unrecorded chattel mortgage, on one side, and the trustee in bankruptcy, on behalf of certain subsequent creditors, on the other side.

As § 496, Kentucky Statutes, providing that no deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deed shall be acknowledged or proved according to law, and lodged for record, has been construed, an unrecorded mortgage is invalid as to subsequent creditors without notice even though such creditors have fastened no lien upon the mortgaged property. *Wicks Bros.* v. *McConnell*, 102 Kentucky, 434; *Besten & Langan* v. *People's Messenger & Parcel Delivery Co.*, 99 S. W. Rep. 631; 30 Ky. Law Rep. 787; *Swafford's Adm'r* v. *Asher*, 105 S. W. Rep. 164; 31 Ky. Law Rep. 1338; *In re Ducker*, 134 Fed. Rep. 43; 13 Am. Bankruptcy Rep. 760.

York Manufacturing Co. v. *Cassell*, 201 U. S. 344, involved a similar question under the laws of Ohio, but under the laws of that State such creditors only who have obtained a lien may resist an unrecorded mortgage.

Appellant relies upon §§ 67a and b of the Bankruptcy Act.

Mr. Keith L. Bullitt, with whom *Mr. Wm. Marshall Bullitt* was on the brief, for appellee:

An unrecorded chattel mortgage is valid under § 496, Kentucky Statutes, as against subsequent creditors who have not reduced their claims to liens. The contract in this case is in effect a mortgage for the purchase price of the steel. *Baldwin* v. *Crow*, 86 Kentucky, 679; *Wicks* v. *McConnell*, 102 Kentucky, 434, 436; *Swafford's Adm'r* v. *Asher*, 31 Ky. Law Rep. 1338.

The lien of the unrecorded mortgage of the Crucible Steel Co. is superior to that of general unsecured creditors

whose debts were created subsequent to the execution of the contract.

The rule in Kentucky prior to the decision of *Swafford's Adm'r* v. *Asher*, 31 Ky. Law Rep. 1338, and *Besten & Langan* v. *People's Messenger Co.*, 99 S. W. Rep. 631, and the general rule throughout the United States, has been that the term "creditors" includes only those who by judgment, attachment, or otherwise, have obtained an interest in, or a lien upon, the property covered by the mortgage, *Button* v. *Rathbone*, 124 N. Y. 538; *Overstreet* v. *Mannering*, 67 Texas, 657; 8 Am. & Eng. Ency. of Law, 241; *Ayres* v. *Duprey*, 27 Texas, 593; *McFadden* v. *Worthington*, 45 Illinois, 365; *Stewart* v. *Beale*, 7 Hun, 405; *Ransom* v. *Schmela*, 13 Nebraska, 77; 12 N. W. Rep. 926; *Grace* v. *Wade*, 45 Texas, 527; *Citizens' Bank* v. *Hibbs*, 11 Ky. Law Rep. 441; *Underwood* v. *Ogden*, 6 B. Mon. 606 (Ky.); *Bailey & Carter* v. *Welch*, 4 B. Mon. 244; *United States Bank* v. *Huth*, 4 B. Mon. 423, 451; *Wicks Bros.* v. *McConnell*, 102 Kentucky, 534; *In re Ducker*, 134 Fed. Rep. 48; *In re Doran*, 154 Fed. Rep. 471; *York Mfg. Co.* v. *Cassell*, 201 U. S. 344.

The rule in Kentucky has not been changed by the decisions rendered in *Swafford's Adm'r* v. *Asher*, and *Besten* v. *People's Messenger Co.*, *supra*.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This appeal brings up for review a decree reversing an order of the District Court for the Western District of Kentucky in a proceeding in bankruptcy. The matter in dispute is the validity, under the recording law of that State, of an unrecorded chattel mortgage as against creditors who became such after the mortgage was given, and without knowledge of it, where none of them had secured a lien upon the mortgaged property by execution,

attachment or otherwise. The mortgagee, in making proof of its claim, asserted a lien under the mortgage and sought priority of payment out of the proceeds of the property covered by it. The claim was allowed, but the District Court, being of opinion that the mortgage was invalid as against the subsequent creditors without notice, held that it gave no right to priority of payment as against them. The mortgagee appealed to the Circuit Court of Appeals, and that court, taking the view that the mortgage was valid as against those creditors, since none had secured any specific lien upon the mortgaged property, sustained the right to priority asserted by the mortgagee. 174 Fed. Rep. 127. The trustee prosecutes the present appeal.

Section 67a of the Bankruptcy Act declares:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

And the applicable provision of the recording law of Kentucky (Stat. 1903, § 496) is as follows:

"No deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deeds shall be acknowledged or proved according to law, and lodged for record."

It is apparent from the language of § 67a and from the decisions of this court in *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344; *Thomas* v. *Taggart*, 209 U. S. 385, and other like cases, that the effect to be given to the unrecorded chattel mortgage must be determined by the recording law of the State; and it is also apparent that the question arising under that law turns upon who are included in the term "creditors" in § 496.

Upon that question the decisions of the Court of Appeals

of the State have not been uniform, but it is conceded, and is evident upon an examination of the more recent decisions, that the term does not include antecedent creditors, or subsequent creditors whose claims are acquired with notice of the unrecorded mortgage, but does include subsequent creditors, without notice, who by their diligence secure a specific lien upon the property, as by execution or attachment, before the mortgage is recorded. *Baldwin* v. *Crow*, 86 Kentucky, 679; *Wicks* v. *McConnell*, 102 Kentucky, 434; *Clift* v. *Williams*, 105 Kentucky, 559; *Bowles' Ex'r* v. *Jones*, 123 Kentucky, 395; *Swafford's Adm'r* v. *Asher*, 105 S. W. Rep. 164. And so, the question for decision is reduced to this: Does the term include subsequent creditors, without notice, who have not secured such a lien?

No case in that court has been called to our attention, and none has been found by us, in which this question was presented for decision and decided; but in two of the later cases there are expressions bearing thereon which are respectively relied upon here. Thus, in *Wicks Bros.* v. *McConnell*, *supra*, where the prior cases were reviewed with the evident purpose of extracting a general and guiding rule, it was said: "On the one hand, the unrecorded lien is upheld as against creditors who cannot be presumed to have given credit upon the faith of the property held in lien. On the other hand, creditors who may be presumed on such faith to have given credit are protected as against the secret lien *in the rights which they secure by their diligence in the levy of their execution or attachment.*" (Italics ours.) And in *Swafford's Adm'r* v. *Asher*, *supra*, it was said: "As the mortgage was not recorded, *it would, of course, not be valid as to creditors whose debts were subsequently created;* but as to those whose debts were created prior to the purchase of the teams and the mortgage upon them the lien is valid, although not recorded as required by § 496 of the Kentucky Statutes of 1903, and,

as said before, *there is nothing to show that any debt of the estate was created after the purchase of the teams, except that of appellant, who had actual notice.*" As *Wicks* v. *McConnell* was cited as sustaining this statement, it is not probable that the court regarded it as overruling or departing from what had been said in that case; and this view receives added support from the fact that the opinion in *Swafford's Adm'r* v. *Asher* was marked by the court "Not to be officially reported." These considerations, coupled with the further fact that in cases such as *Bowles' Ex'r* v. *Jones, supra*, where subsequent creditors prevailed over such a mortgagee, the court was careful to state, not only that the claims of the creditors arose after the date of the unrecorded mortgage, but also that the creditors had obtained attachment or other liens upon the mortgaged property before the mortgage was recorded, are persuasive that what was said in *Wicks Bros.* v. *McConnell* should be accepted as reflecting the true construction of § 496, in the absence of some more positive and direct ruling upon the subject by the Court of Appeals of the State. Such was the view of the Circuit Court of Appeals, and we are at least unable to say that it was wrong. It follows that, as here the subsequent creditors had not fastened any lien upon the property covered by the mortgage prior to the proceedings in bankruptcy by which the title passed to the trustee, the mortgage, although unrecorded, was valid and effective against them.

Decree affirmed.